HOO THIAN SIONG v. PUBLIC PROSECUTOR

[O.Cr.J. (Mustapha Hussain J.) 23 May 1987]

[Seremban – Criminal Application No. 54-50 of 1987]

Criminal Law – Dangerous drugs – Treatment and rehabilitation – Order of detention – Right of representations – Validity of order – Drug Dependants (Treatment and Rehabilitation) Act 1983, ss. 4(1)(b) & 6(1)(a).

Constitutional Law – Right to counsel – Arrested person not given opportunity of making representation – Federal Constitution, Art. 5(3).

The applicant was produced before the magistrate at Port Dickson under section 4(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983. He asked for bail and when he was produced again on 13 April 1987, the learned magistrate ordered the applicant to be detained for two years at Pusat Serenti, Tampin. The father of the applicant then applied to the High Court for the magistrate's order to be set aside on the grounds, *inter alia*, that the applicant was not represented by counsel at the hearing on 13 April 1987.

Held, allowing the application: (1) even without reference to Article 5(3) of the Federal Constitution, it is incumbent on the learned magistrate to give the applicant the opportunity of making representations;

(2) there is no record that the applicant here was given that opportunity of making representations which is not the same as making appeals and pleas. Making representations means the right to protest which, by necessary implication and reading it in the context of Article 5(3) of the Constitution, is a right to challenge whatever is being brought against him. On this ground alone, the order of the learned magistrate made under section 6(1)(a) of the Act is invalid.

Case referred to:

(1) *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors.* v. *Datuk James Wong Kim Min* [1976] 2 M.L.J. 245 (cited).

CRIMINAL APPLICATION.

Christopher Fernando for the applicant.

Mohd. Zaki bin Md. Yasin (Deputy Public Prosecutor) for the Public Prosecutor.

Cur. Adv. Vult.

Mustapha Hussain J.. The applicant Hoo Thian Siong is 27 years old. He was produced by Inspector Abdullah before the magistrate at Port Dickson Magistrate's Court under section 4(1)(b) of the Drug Dependants (Treatment and Rehabilitation) Act 1983. The notes of proceedings read as follows:

"30 March 1987
Penama di kemukakan oleh Inspector Abdullah.

Mohon dibebaskan dengan jaminan sebab pekerjaan akan terjejas.

Seorang mandor dengan empat orang pekerja. Jika ditahan, pekerja-pekerja nya juga akan kehilangan pekerjaan.
Insp. Abdullah menerangkan paling lama untuk mendapatkan keputusan ujian air kencing ialah 1 minggu.

Mahkamah: Dibenarkan tahan sehingga 13 April 1987.

t.t."

The applicant had asked for bail saying that four persons working under him would lose their jobs. Then Inspector Abdullah had said that it would take about one week for the results of urine tests. The learned magistrate ordered, under section 4(1)(b) of the said Act, the applicant to be detained until 13 April 1987.

On 13 April 1987, the applicant was produced again before the learned magistrate at Port Dickson Magistrate's Court when the learned magistrate made the order of detention of the applicant for two years at Pusat Serenti, Tampin. The notes made by the learned magistrate read as follows:

"13 April 1987
Penama dikemukakan oleh
Ujian air kencing positif
Lapuran latarbelakang dikemukakan oleh En. Hashim
Lapuran latarbelakang diakui benar

Rayuan: Mempunyai kerja tetap. Mohon mahkamah peluang. Janji akan tukar corak hidup. Tidak akan mengecewakan peluang yang diberi.

Bapa: Mohon anak diberi peluang. Akan lapur pada polis jika dapati anak menagih. Sanggup jamin.

Mahkamah: Diperintahkan tahan untuk pemulihan selama 2 tahun di pusat Serenti Tampin.

t.t."

The father of the applicant then applied to the High Court for the magistrate's order of detention for two years to be set aside and in the father's affidavit the grounds in support of the application were:

(1) That his son, the applicant, was not represented by counsel at the hearing on 13 April 1987.

(2) That his son, the applicant, was not advised by the court or anybody else as to the true meaning and implication of the term "drug dependant".

(3) That the learned magistrate erred in law and in fact in making the order of detention in the absence of a proper and valid medical certificate as required by the said law.

On the day of hearing the application, just before the court sat, the applicant himself filed an affidavit adopting the affidavit filed by his father, as he could only do so when he was produced before the High Court for the hearing of his application.

At the hearing of the application, the court was referred to Article 5(3) of the Federal Constitution which declares "that when a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice".

Subsection (1) to section 6 of the Drug Dependants (Treatment and Rehabilitation) Act 1983 spells out that the magistrate "*after giving such person an opportunity to make representations* followed by (a) ... *order such person to reside at such centre for a period of two years to undergo treatment and rehabilitation and* ..."

It is clear even without reference to Article 5(3) of the Federal Constitution, it is incumbent on the learned magistrate to give the applicant the opportunity of making representations. From the notes of evidence, nowhere can it be seen or recorded that "Penama di beri peluang membuat bantahan" or words to that effect. What was here is that the applicant had asked for bail and had appealed ("rayuan") that if he was detained his four workers working under him would lose their jobs. He had asked for a chance and promised to lead a good life. His father also asked for a chance and said he would report to the police if his son took drugs again. What transpired from the side of the applicant was "rayuan" or plea to be released on bail and that he would lead a clean life.

The Act specifically enacted the words "giving such person an opportunity to make representations". Making representations is not the same as making appeals or pleas. Making representations here means the right to protest, which by necessary implication and reading it in the context of Article 5(3) of the Federal Constitution, is a right to challenge whatever is being brought against him.

In any event, there is no record that the applicant here was given that opportunity of making representations, not merely making appeals and pleas. This is a case of deprivation of liberty and it was said in *Re Datuk James Wong Kim Min; Minister of Home Affairs, Malaysia & Ors.* v. *Datuk James Wong Kim Min*[1] that strict compliance with the statutory requirements must be observed. It is evident this was not observed in the proceedings before the learned magistrate on 13 April 1987. Serenti is not a Butlin's holiday camp. Though it is for the applicant's own good, still it is a deprivation of his liberty. On this ground alone, the order of the learned magistrate made under section 6(1)(a) of the said Act is invalid. The court therefore set aside the order of the learned magistrate made on 13 April 1987.

The other point taken up by the applicant, though not decided upon but pertinent to note, was that the medical certificate (Lampiran B) did not conform to the format laid down in Borang 2 of the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983 (P.U.(A) 485/83) where it is stated that the forms used "shall be those appearing in the Schedule".

The medical certificate certifying that the applicant was a drug addict stated:

"... *mengesahkan bahawa saya telah memeriksa penama* ..."

whereas in the Form 2, it is stated:

"... *setelah menjalankan ujian-ujian yang perlu ke atas* ..."

It is evident that the rules and the form require that some tests should be carried out. "Memeriksa" cannot mean "ujian-ujian" because "periksa" could be checks, could be searches and could be tests. It is too general. On the other hand, "ujian-ujian" means tests. And tests that are necessary. This again, it would seem, was not in strict compliance with the statutory requirements. As stated above, this point of the form was not fully argued and not decided upon as the first point on the omission to give the opportunity of making representations was sufficient to dispose of the application.

Order accordingly.

Solicitors: *Gunaretnam & Co.*